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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

NORTHEAST BANCORP, INC., UNION TRUST COMPANY and CITICORP,
Petitioners,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent,

—and—

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS NORTHEAST BANCORP, INC. AND UNION TRUST COMPANY

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Questions Presented

1. Whether reciprocal state statutes that boycott interstate bank acquisitions by holding companies located outside the New England region impermissibly burden the national interests embodied in the Commerce Clause and the Compact Clause of the Constitution?

2. Whether in enacting the Douglas Amendment to the Bank Holding Company Act of 1956 Congress authorized the states to create geographically restrictive interstate banking regions?

Parties to the Proceeding

The caption of the case in this Court lists all parties to the proceeding. The Rule 28.1 listing of petitioners' parent companies, subsidiaries and affiliates appears in the Appendix to the Petition for Certiorari ("Pet. App.") at A1.

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Intervenor-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS NORTHEAST BANCORP, INC. AND UNION TRUST COMPANY

Opinions Below

The opinion of the Court of Appeals (reported at 740 F.2d 203) is reproduced at Pet. App. A21-A33. The judgment is reproduced in the Joint Appendix ("J. App.")

at A3. The order of the Board of Governors of the Federal Reserve System (the "Board") approving the merger of Bank of New England Corporation ("BNE") and CBT Corporation ("CBT") is reported at 70 Fed. Res. Bull. 374 (1984) (Pet. App. A34-A71); the Board's order approving the acquisition by Hartford National Corporation ("HNC") of Arltru Bancorporation, Inc. ("Arltru") is reported at 70 Fed. Res. Bull. 353 (1984) (Pet. App. A72-A78); and the Board's order approving the acquisition by Bank of Boston Corporation ("BBC") of Colonial Bancorp, Inc. ("Colonial") is reported at 70 Fed. Res. Bull. 524 (1984) (Pet. App. A79-A86).

Jurisdiction

The judgment of the Court of Appeals was entered on August 1, 1984. The petition for a writ of certiorari was timely filed on September 6, 1984, and was granted on January 7, 1985. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

This case involves the Commerce Clause (Art. I, § 8, cl. 3) and the Compact Clause (Art. I, § 10, cl. 3) of the United States Constitution; 12 U.S.C. § 1842(d) (the "Douglas Amendment"); a Connecticut statute, 1983 Conn. Act 83-411 (Reg. Sess.) (to be codified at Conn. Gen. Stat. Ann. § 36 Pts. 552-57); and a Massachusetts statute. Mass. Gen. Laws Ann. ch. 167A § 2 (West 1971 & Supp. 1984). These constitutional and statutory provisions are reproduced at Pet. App. A95-A102.

Statement of the Case

Petitioners challenge reciprocal Connecticut and Massachusetts statutes that permit full banking services to be

offered by local bank holding companies throughout the New England region but exclude companies located in other states from offering such services within the region. The statutes in question, and the compact of which they are an integral part, represent an unprecedented frontal assault on both the rights of sister states and the authority of the federal government.

Petitioner Northeast Bancorp, Inc. ("Northeast") is a bank holding company organized under Connecticut law. Its wholly-owned subsidiary, petitioner Union Trust Company ("Union Trust"), is a Connecticut bank that competes directly with banks owned by CBT, HNC and Colonial, among others. On August 3, 1983, The Bank of New York Corporation, a New York bank holding company, agreed to acquire the stock of Northeast.[1]

By virtue of the regional restriction provisions of the challenged statutes, non-New England bank holding companies, such as The Bank of New York, are barred from controlling a Connecticut or Massachusetts bank, and their New England-based acquisition partners, such as Northeast, are unable to serve their shareholders and customers by combining with desirable, non-New England companies.

A. Statement of Facts

In 1956 Congress enacted the Bank Holding Company Act (the "BHCA"), 12 U.S.C. §§ 1841 *et seq.*, which provides, *inter alia,* that a bank holding company [2] may not

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[1] The Bank of New York has moved for leave to file a brief in this action as *amicus curiae.*

[2] A "bank holding company" is defined, for purposes of the BHCA, as a company that controls any bank or bank holding company. *See* 12 U.S.C. § 1841(a)(1).

acquire a bank[3] unless the transaction has been approved by the Board pursuant to specified competitive, financial and other standards. *See* 12 U.S.C. § 1842(a). Section 3(d) of the BHCA, commonly referred to as the Douglas Amendment, absolutely prohibits the Board from approving such an acquisition by any out-of-state bank holding company, unless

> "the acquisition . . . of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication."

12 U.S.C. § 1842(d).

On December 30, 1982, Massachusetts passed a statute designed to lift the general federal prohibition on interstate banking imposed by the Douglas Amendment.[4] This law authorizes an out-of-state bank holding company to acquire control of a Massachusetts bank if the acquiring institution (and any parent company) conduct their principal banking operations and maintain their principal places of business in one of the other five New England states, and provided that their home states accord reciprocal acquisition privileges to banking institutions located within Massachusetts. The express purpose of this law is to establish a New England banking system and to ensure that only New England banking institutions may avail themselves of its benefits. *See* pp. 14-15, *infra*.

In an effort to convince the other New England states to "join the Massachusetts plan and set up a real New

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[3] In relevant part, 12 U.S.C. § 1841(c) defines a "bank" as an "institution . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans."

[4] Mass. Gen. Laws Ann. ch. 167A § 2 (West 1971 & Supp. 1984) (Pet. App. A101-A102).

England system" (Pet. App. A189; A162-A168), the principal sponsor of the Massachusetts Act, State Senator John Brennan, convened a meeting of bankers, regulators, legislators and others from the several New England states in February 1983. Thereafter, on June 8, 1983, Connecticut enacted an interstate banking statute with reciprocity and regional restriction provisions modeled on the Massachusetts Act.[5] On May 17, 1983, Rhode Island enacted similar reciprocal, regionally restrictive legislation.[6]

The Massachusetts, Connecticut and Rhode Island statutes create a "New England Compact" and are strikingly different from any prior state law designed to lift the Douglas Amendment's ban on interstate bank acquisitions. While additional states had previously passed laws that authorized interstate acquisitions, none of these discriminated on the basis of geographic origin.[7]

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[5] 1983 Conn. Act. 83-411 (Pet. App. A97-A100). Senator Brennan testified before the Connecticut Legislature and recommended the "adoption of a regional approach to interstate banking." In his view, the bill that Connecticut ultimately enacted bore a "remarkable similarity to the Massachusetts [Act] . . . [and] would be a very very good companion to the Massachusetts concept. . . . " (Pet. App. A154). *See also* Conn. Senate Debate at 70 (Sen. Sullivan) (Pet. App. A160); Conn. House Debate at 269 (Rep. Flinn) (Ct. App. JA833).

[6] R.I. Pub. Law S. 0661 Sub. A (Pet. App. A103-A106). The regional restriction provision of the Rhode Island Act expires on July 1, 1986.

The other New England states have not followed suit. Maine permits virtually unlimited interstate bank acquisitions. Me. Pub. L. 1983, ch. 302 § 2, as amended (1984). Neither New Hampshire nor Vermont has enacted any applicable statute.

[7] For sixteen years following passage of the Douglas Amendment no state sought to authorize any interstate bank acquisitions. The barrier was first broken in 1972 when Iowa enacted a statute that allowed the only out-of-state bank holding company that owned any Iowa banks to maintain and expand its in-state banking activities.

(footnote continued on following page)

The New England Compact is serving as the model for regionally restrictive interstate compacts that are forming in other sections of the country. As the Board has observed, "no fewer than 15 state legislatures are considering proposals that, if enacted, would create regional banking systems in every part of the country" (Pet. App. A37). Since the Board's March 26, 1984 approvals of the BNE and HNC applications, Kentucky, Utah, Florida, North Carolina and South Carolina have enacted regionally restrictive interstate banking statutes. The latter three states, together with Georgia, have now established a Southeast banking region. (Pet. App. A232; A245).[8]

The proponents of regionally restrictive interstate banking compacts have attempted unsuccessfully to persuade

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(footnote continued from preceding page)

Iowa Code Ann. § 524.1805. In *Iowa Independent Bankers* v. *Board of Governors*, 511 F.2d 1288 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975), this statute survived constitutional challenge under the Equal Protection and Supremacy Clauses. Two other states have similar grandfathering statutes. Fla. Stat. Ann. § 658.29 (West Supp. 1983); Ill. Ann. Stat. ch. 17 § 2510 (Smith-Hurd 1981).

Six states now allow out-of-state ownership of banks established for a particular purpose. Del. Code Ann. tit. 5 § 801 *et seq.* (Cum. Supp. 1984); Md. Fin. Inst. Code Ann. § 5-903 (Cum. Supp. 1984); Neb. Rev. Stat. § 8-1512 (Supp. 1983 & 1984); Nev. Rev. Stat. ch. 666.132 (Cum. Supp. 1984); S.D. Codified Laws § 51-16-41 (Supp. 1984); Va. Code § 6.1-392 (1983). Alaska permits interstate acquisitions of banks formed prior to a specific date. Alaska Stat. § 06.05.235 (Cum. Supp. 1984). Oregon and Washington permit the interstate acquisition of failing banks. Or. Rev. Stat. § 716.920 (8) (1983) (limited to contiguous states); Wash. Rev. Code Ann. 30.04.230 (Supp. 1985). New York allows acquisitions by out-of-state bank holding companies whose home states reciprocate. N.Y. Banking Law § 142-b (McKinney Supp. 1983).

[8] Fla. Stat. Ann. § 658.295 *et seq.*; Ga. Code § 7-1-620 *et seq.* (Cum. Supp. 1984); Ky. Rev. Stat. § 287-900 *et seq.* (Cum. Supp. 1984); N.C. Gen. Stat. § 53-209 *et seq.* (Interim Supp. 1984); S.C. Laws tit. 34 ch. 24, 25 (Supp. 1985); Utah Code Ann. 7-1-702 (Interim Supp. 1984).

Congress to enact legislation authorizing their arrangements. United States Senator Paul E. Tsongas and United States Representative Barney Frank, both of Massachusetts, jointly sponsored a bill in Congress that was intended to give federal approval to such compacts (Pet. App. A190-A191). A similar provision was included in an omnibus banking bill, the Financial Services Equity Act, that passed the Senate on September 13, 1984.[9] However, Chairman St Germain of the House Banking Committee gave notice at that time that interstate banking would not be taken up by either his Committee or the House during the session. Commenting on problem areas in the Senate bill, he noted that regional banking compacts "raise significant constitutional questions." [10] House Judiciary Chairman Rodino has also explained that, before enacting any such measure, Congress would need carefully to review the proposal (Pet. Reply Brief at A2).

B. Proceedings Below

1. *The Board's Orders*

Massachusetts and Connecticut bank holding companies quickly sought to take advantage of the statutes challenged here. Immediately following passage of the Connecticut Act in June 1983, BNE, the fourth largest bank holding company in Massachusetts, and CBT, the largest Connecticut bank holding company, agreed to merge. Two months later HNC, the second largest Connecticut bank holding company, agreed to acquire Arltru, the owner of a Massachusetts bank. And, in November 1983, BBC, a Massachusetts bank holding company and the largest such

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[9] *See* S. 2851, 98th Cong., 2d Sess. § 903(2), 130 Cong. Rec. S11, 178 (daily ed. Sept. 13, 1984).

[10] 130 Cong. Rec. H10005 (daily ed. Sept. 24, 1984) (statement of Rep. St Germain).

company in New England, agreed to acquire Colonial, the owner of a Connecticut bank.

In their applications to the Board for approval of their respective consolidations, BNE, HNC and BBC contended that the Connecticut and Massachusetts Acts authorized the Board to approve their transactions under the Douglas Amendment. As interested parties that would be directly injured by consummation of the proposed transactions, [11] petitioners contended before the Board that these state statutes cannot authorize the acquisitions because they are unconstitutional under the Commerce and Compact Clauses of the Constitution.[12]

On March 26, 1984, the Board approved BNE's application. Conceding a lack of competence to address the constitutional issues raised by petitioners, the Board stated that the application should be approved unless the constitutional infirmities of the Connecticut statute were "clear and unequivocal" (Pet. App. A41). Relying on a staff analysis of the impact of the Douglas Amendment on the Connecticut statute's constitutionality (Pet. App. A49-A71), which was adopted as "part of the Board's findings" (Pet. App. A41 n.15), the Board found that this stringent standard had not been met because the Douglas Amendment may arguably be read as a "renunciation of federal interest in regulating the interstate acquisition of banks by bank holding companies" (Pet. App. A52).

On the same day, the Board, reviewing the Massachusetts statute, approved HNC's application to acquire Arltru,

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[11] *See* 12 U.S.C. §§ 1842(b), 1850; Pet. App. A38 n.6; Pet. App. A233-A237.

[12] Petitioner Citicorp challenged each of these applications. Northeast and Union Trust challenged only the BNE application before the Board, but subsequently broadened their challenge in the Court of Appeals. *See* n.13, *infra*.

stating that "its reasoning with respect to the Connecticut Act's constitutionality applies directly to the Massachusetts Interstate Banking Act" (Pet. App. A75). While these two orders were on review in the Court of Appeals, the Board, on May 18, 1984, approved BBC's application to acquire Colonial, reasoning: "In the absence of a judicial determination regarding the constitutionality of the Connecticut interstate banking statute, the Board believes that it is appropriate in this case to apply the analysis articulated in the [BNE] and [HNC] cases" (Pet. App. A84).

The Board recognized that its tentative resolution of the "unique and fundamental constitutional issues" inherent in discriminatory multistate arrangements such as the New England Compact was "not free from doubt" (Pet. App. A41; A83). As Board Chairman Paul A. Volcker later advised Congress, the Board acted simply on an "assumption of constitutionality" when it approved the applications (Pet. App. A197); according to Chairman Volcker, the Board perceives "serious questions both about the constitutionality of such arrangements and their implications for public policy" (Pet. App. A199).

2. *The Court of Appeals' Decision*

Petitioners sought review of the Board's orders pursuant to 12 U.S.C. § 1848.[13] The orders were stayed pending final disposition.[14] On the merits, the Court of Appeals

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[13] Citicorp filed a petition for review of each of the challenged Board orders. Northeast and Union Trust filed a petition for review of the Board's BNE-CBT order, and were granted the right to intervene in the appeal from the HNC-Arltru order (Pet. App. A94). The Court of Appeals subsequently consolidated the BBC-Colonial appeal with the appeals from the other two orders.

[14] The Court of Appeals stayed the Board's BNE-CBT and HNC-Arltru orders, and the Board stayed the BBC-Colonial order. (Pet. App. A90-A92). *See* Fed. R. App. P. 18.

noted the Board's observation that the Douglas Amendment constitutes a "renunciation of federal interest in regulating the interstate acquisitions of banks by bank holding companies" (Pet. App. A29 (quoting BNE order)) and, according "substantial deference" to the Board (Pet. App. A29 (quoting *Securities Industry Association* v. *Board of Governors,* — U.S. —, —, 104 S. Ct. 2979, 2983 (1984)), affirmed the orders on review.

In assessing petitioners' Commerce Clause contentions, the court observed that because the Douglas Amendment imposes a federal ban on interstate bank acquisitions, "the Massachusetts and Connecticut statutes would appear to promote interstate commerce rather than restrict it" (Pet. App. A29). The court then stated, "Congress may authorize the states to enact statutes which may interfere with interstate commerce" and held: "We believe that, by enacting the Douglas Amendment, Congress authorized Massachusetts and Connecticut to enact the statutes challenged here" (Pet. App. A30-A31).

With regard to the Compact Clause, the court agreed with the Board's finding that these reciprocal statutes are part of an interstate compact, but held that the compact does not require consent from Congress because:

> "[W]e do not think that a New England bank holding company system would in any way increase the political power of the New England states or encroach upon or interfere with the just supremacy of the United States. However, if at any time Congress should find any encroachment, it could remove the encroachment by appropriate legislation."

Pet. App. A32.

Following entry of judgment, the Court of Appeals stayed issuance of the mandate pending certiorari proceed-

ings and final disposition by this Court. *See* Fed. R. App. P. 41(b). Thereafter, the Court of Appeals denied motions by the respondent bank holding companies to vacate that stay and issue the mandate forthwith.

Summary of Argument

The Commerce and Compact Clauses of the Constitution were designed by the Framers to insure that tendencies toward state and regional parochialism would be effectively checked in areas of national concern. This was accomplished by entrusting the regulation of interstate commerce to the Congress and by requiring that Congress consent to any multistate arrangement that affects our federal structure. Absent readily identifiable congressional consent to deviations from the norm established by these constitutional provisions, concerted state action that discriminates against interstate trade or otherwise operates to the detriment of the nation is invalid.

The Massachussets and Connecticut statutes are *per se* unconstitutional under the Commerce Clause because they effect a naked geographic boycott against sister states for the purpose of insulating local banking institutions from competition by non-New England firms. Alternatively, under this Court's decision in *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980), any legitimate local interests promoted by these discriminatory statutes cannot be justified as an incidental burden on interstate commerce.

Further, the multistate, reciprocal character of these laws encourages the kind of disruptive regionalism that the Compact Clause was intended to prevent. They do so by augmenting regional interests at the expense of those of sister states, and by encroaching upon federal banking laws.

Given the clear unconstitutionality of these laws, the determinative issue before this Court is whether, under both the Commerce and Compact Clauses, the Douglas Amendment constitutes congressional authorization for these regionally restrictive interstate banking statutes. This Court's Commerce Clause decisions require that congressional consent to state laws that unduly burden interstate commerce be unmistakably clear. The language of the Douglas Amendment—which imposes a general prohibition on interstate bank acquisitions by bank holding companies but permits the individual states to lift the federal ban—does not suggest, let alone state, that in determining the validity of such state laws, Congress abrogated the negative implications of the Commerce Clause. Nor is there any indication in the legislative history that Congress intended to waive the traditional protections of this Clause.

The text of the Compact Clause requires an even clearer manifestation of congressional consent than that mandated by the Commerce Clause, given the potentially serious threat to national unity posed by exclusionary, multistate action. Whatever the Douglas Amendment may mean, it cannot seriously be contended that it constitutes congressional consent to an interstate compact that had yet to be conceived at the time that statute was passed.

The consent standards of the Commerce and Compact Clauses guarantee that, before a state is subjected to discriminatory legislation by sister states, or our federal structure is otherwise impaired, the national legislature will have focused on the issue, debated the wisdom of imposing discrimination and approved the result. Judicial implication of congressional approval of discriminatory regional combinations would threaten our federal structure with hazards that the burdened interests and the nation at large have not had an opportunity to contest.

ARGUMENT

I

THE NEW ENGLAND COMPACT VIOLATES THE COMMERCE CLAUSE

The Constitution explicitly grants Congress the authority to "regulate Commerce . . . among the several States." [15] The Commerce Clause

> "reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."

Hughes v. *Oklahoma*, 441 U.S. 322, 325-26 (1979). Consequently, while it speaks in terms of powers bestowed upon Congress, the Commerce Clause has also served, since *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299, 318 (1852), to limit the power of the states to erect barriers against, or to impose burdens on, interstate trade. *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 537-38 (1949); *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333, 350 (1977).

This Court consistently has held that when state legislation is openly protectionist—when it overtly discriminates against trade originating from a particular state or states in order to further local economic interests—a *per se* rule of unconstitutionality will be applied. *See Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978). On the other hand, when legislation promotes a legitimate state objective in an

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[15] U.S. Const. art. I, § 8, cl. 3.

even-handed manner, the Court balances the state interests advanced against the federal interest in unencumbered interstate commerce, and requires the state to promote its valid interests with the least possible injury to interstate trade. *See Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The New England Compact enacted by Connecticut and Massachusetts violates both the *per se* and the balancing tests.

A. The New England Compact Is Unconstitutional *Per Se* as a Geographic Boycott Enacted Solely for the Purpose of Economic Protectionism

The plain language and legislative history of the Connecticut and Massachusetts Acts manifest their discriminatory, protectionist purpose and effect. Both Senator Sullivan and Representative Onorato, the principal sponsors of the Connecticut Act, urged the adoption of the regional restriction provision in order to protect Connecticut banking institutions from competition by large out-of-state institutions, particularly those located in the nation's money centers, *i.e.*, New York, Illinois, Texas and California.[16] Similarly,

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[16] Senator Sullivan clearly articulated the Act's discriminatory, protectionist purpose:

> "[T]he main reason for this New England position is . . . to give our banks in Connecticut time to gird for the eventual coming of wide-open interstate banking, . . . in order to give our banks in Connecticut time to merge and consolidate and purchase some of [*sic*] New England banks around and get as large as they possibly can so we can thwart any intervention as best we can from the large institutions. . . .
>
> * * *
>
> What we're trying to do here is to get our New England financial institutions in a position where they can withstand the assault of the big money markets . . . so that we can get the New England banks merged together and bought [*sic*] together so that they can . . . compete with the big money centers in New York and get stronger and stronger. . . ."

(footnote continued on following page)

according to its principal sponsor, State Senator John Brennan, the Massachusetts Act was specifically intended to exclude New York bank holding companies in order to give local companies "the space to grow" (Pet. App. A189).[17]

The geographic discrimination in both the Connecticut and Massachusetts Acts reflects the very essence of local parochialism and protectionism that the Commerce Clause prohibits. *See Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980) (citing *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 538 (1949)); *Buck* v. *Kuykendall*, 267 U.S. 307, 315-16 (1925). Indeed, even if the New England Compact served objectives beyond local and regional protectionism, it could not withstand scrutiny under the *per se* test. In *Philadelphia* v. *New Jersey*, 437 U.S. 617, 623-24 (1978), this Court held that, regardless of the purpose of state legislation, such legislation is *per se* uncon-

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(footnote continued from preceding page)

Pet. App. A159-A160. Similarly, Representative Onorato openly acknowledged the parochial, protectionist goal of the Connecticut Act:

> "[I]f you want to talk about protecting the integrity of our own Connecticut home banks, what this bill does is gives Connecticut the lead time that it needs to go into the regional areas where they have something in common with other members.
>
> Give them a chance to grow and then they'll be in a position to compete."

Pet. App. A157.

[17] In summarizing a draft of the bill that eventually became the Massachusetts Act, the Research Staff of the Massachusetts House Committee on Banks and Banking noted that the purpose of the bill was:

> "to establish in the General Laws [of Massachusetts] the necessary authority for a regional, New England, banking system . . . [and] to ensure that only New England based financial institutions can avail themselves of this authority."

Pet. App. A150.

stitutional if its effect is to discriminate against interstate commerce.[18]

Moreover, the New England Compact is not the action of a single state, but rather is part of a more objectionable arrangement by a group of states to discriminate against their sister states and form an insular banking region. Thus, as the Board correctly recognized, the prohibitions of the Commerce Clause "are particularly applicable to state statutes that selectively confer benefits on one or more states and deny these same benefits to still other states" (Pet. App. A56).[19] Accordingly, regardless of any justification Massachusetts or Connecticut could attempt to offer for their statutes, the effect of those laws condemns them as *per se* violations of the Commerce Clause.

B. Under This Court's Decision in *Lewis* v. *BT Investment Managers, Inc.*, the New England Compact Cannot Be Justified as an Incidental Burden Necessitated by Legitimate Local Concerns

If, despite the patent discriminatory purpose and effect of the Massachusetts and Connecticut Acts, this Court were

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[18] "[T]he evil of protectionism can reside in legislative means as well as legislative ends. . . . [W]hatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect, [the statute] violates this principle of nondiscrimination." 437 U.S. at 626-27. *See also Toomer* v. *Witsell*, 334 U.S. 385, 404-06 (1948); *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-24 (1935).

[19] *Accord Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346, 351 (1939) ("The United States could not exist as a nation if each of them were to have the power . . . to discriminate as between neighboring states in admitting articles produced therein."); *Brimmer* v. *Rebman*, 138 U.S. 78, 82 (1891) ("[A state] . . . may not . . . make discriminations against the products and industries of some of the States in favor of the products and industries of its own or of other States").

to apply the "balancing test" used to evaluate even-handed laws adopted for legitimate purposes under the Commerce Clause, analysis of the regional restriction provisions of those statutes would lead to the same conclusion of unconstitutionality. The immutable geographic discrimination established by these statutes cannot be justified by any asserted state objective.

In *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980), this Court considered a Commerce Clause challenge to a Florida statute designed to prevent out-of-state banks, trust companies and bank holding companies from owning or controlling an investment advisory business in Florida. Identifying three interests Florida sought to promote through its legislation—regulating local financial practices, discouraging undue economic concentration, and maximizing local control over local financial activities—and without considering whether the statute was unconstitutional *per se*, this Court found that "the disparate treatment of out-of-state bank holding companies cannot be justified as an incidental burden necessitated by legitimate local concerns." 447 U.S. at 42. The Court reasoned:

> "[W]e are not persuaded that these interests justify the heavily disproportionate burden this statute places on bank holding companies that operate principally outside the State. Appellant has demonstrated no basis for an inference that all out-of-state bank holding companies are likely to possess the evils of monopoly power, that they are more likely to do so than their homegrown counterparts, or that they are any more inclined to engage in sharp practices than bank holding companies that are locally based. Nor is there any reason to conclude that outright prohibition of entry, rather than some intermediate form of regulation, is the only effective method of protecting against the presumed evils. . . .

> With regard to the asserted interest in promoting local control over financial institutions, we doubt that the interest itself is entirely clear of any tinge of local parochialism. In almost any Commerce Clause case it would be possible for a State to argue that it has an interest in bolstering local ownership, or wealth, or control of business enterprise. Yet these arguments are at odds with the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition."

447 U.S. at 43-44 (citations and footnote omitted).

Here, as in *Lewis*, the interest in protecting local banks from large out-of-state banking institutions cannot justify the geographic discrimination mandated by the challenged legislation. Massachusetts and Connecticut have demonstrated absolutely no basis for inferring that all non-New England bank holding companies share the alleged evil of bigness. Nor is there any reason to conclude that this presumed evil is not shared by certain New England institutions that are just as large or larger than many non-New England banks.[20] Finally, the interests of Massachusetts and Connecticut in protecting local credit are not furthered by the New England Compact since there is nothing in their reciprocal statutes to guard against the depletion of these resources by distant New England institutions. "There is thus no reason to believe that the State's interest in local control, to the extent it legitimately exists, has been sig-

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[20] Yet, under the New England Compact, BBC, located in Massachusetts, is accorded the right to acquire Connecticut's Colonial while The Bank of New York, a holding company smaller than BBC, is denied the right to acquire Northeast, an institution approximately the same size as Colonial. *See* J. App. A25.

nificantly or evenhandedly advanced by the statutory means that have been employed." 447 U.S. at 44.[21]

C. The Court of Appeals Erred in Not Applying Either the *Per Se* or the Balancing Test to the New England Compact

The Court of Appeals did not discuss either the *per se* or the balancing tests; rather it observed that "in permitting interstate acquisitions (albeit limited to New England), the Massachusetts and Connecticut statutes would appear to promote interstate commerce rather than restrict it" (Pet. App. A29). The argument apparently is that since any state legislation allowing any interstate bank acquisition is, by definition, less burdensome than the total federal prohibition, the states are therefore free to impose whatever restrictions they might choose, no matter how discriminatory. However, neither logic nor Constitutional authority suggests that the ability of a state to permit commerce that otherwise would be federally prohibited is in any way equivalent to authority to discriminate geographically among sister states.

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[21] The New England Compact also violates the Commerce Clause prohibition against a state attempting to govern conduct outside of its own borders. For example, the Connecticut Act prohibits the acquisition of a Connecticut bank by a New England bank holding company (and, indeed, would require divestiture of such a bank acquired in a previously approved transaction) if the acquiring company or its parent owns or acquires any bank that has its main office or principal place of business outside of New England. As this Court recently said in *Edgar* v. *MITE Corp.*, 457 U.S. 624 (1982):

> "The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, 'any attempt "directly" to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.' "

457 U.S. at 643 (citation omitted). *See Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 767 n.2 (1945); *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 521-22 (1935); *United States Brewers Ass'n, Inc.* v. *Healy*, 692 F.2d 275, 279-80 (2d Cir. 1982), *aff'd*, — U.S. —, 104 S. Ct. 265 (1983).

This observation by the Court of Appeals also overlooks the critical notion of federalism embodied in the Commerce Clause. It is one thing for Congress to restrict interstate commerce, or expressly to authorize its restriction, but it is quite another for the states, lacking any express authority and relying upon Congressional silence, to arrogate this power to themselves. *See H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 543 (1949) ("It is, of course, a quite different thing if Congress through its agents finds . . . restrictions upon interstate commerce advance the national welfare, than if a locality is held free to impose them because it, judging its own cause, finds them in the interest of local prosperity."). Any regional commerce purportedly fostered by restrictive state legislation is purchased at too high a price when that legislation constitutes blatant discrimination by a group of states against co-equal sister states that may be induced to retaliate. *See Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935).

D. The Douglas Amendment Does Not Establish That Congress Affirmatively Contemplated, and Unmistakably Intended to Remove From the Reach of the Commerce Clause, Othewise Invalid State Legislation

In the exercise of its plenary authority over interstate commerce, Congress may confer upon the states an ability to "restrict the flow of interstate commerce that they would not otherwise enjoy." *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. at 44. *Accord Western & Southern Life Insurance Co.* v. *State Board of Equalization*, 451 U.S. 648 (1981). Only last Term, however, this Court reiterated "that for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear." *South-Central Timber Development, Inc.* v. *Wunnicke*, — U.S. —, —, 104 S. Ct. 2237, 2242 (1984). Without such a showing, a state may neither

discriminate against nor unduly burden interstate commerce. *See, e.g., Sporhase* v. *Nebraska,* 458 U.S. 941 (1982); *New England Power Co.* v. *New Hampshire,* 455 U.S. 331 (1982). In *Wunnicke* the Court reasoned:

> "The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine. . . . Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States. . . . [W]hen Congress acts, all segments of the country are represented and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one. A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce."

— U.S. at —, 104 S. Ct. at 2242-43 (footnote omitted). In applying this principle, the Court has noted that "when Congress has not 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause, we have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.' " *New England Power Co.* v. *New Hampshire,* 455 U.S. 331, 343 (1982) (citations omitted).

Although it did not explain its reasoning, the Court of Appeals indicated a belief that "by enacting the Douglas Amendment, the Congress authorized Massachusetts and Connecticut to enact the statutes challenged here" (Pet. App. A31). However, the clear language of the Douglas Amendment and its legislative history demonstrate that such a construction is improper.

1. *The Statutory Language of the Douglas Amendment Does Not Unmistakably Authorize the New England Compact*

By its terms, the Douglas Amendment prohibits the Board from allowing out-of-state bank holding companies to acquire a bank in a state "unless the acquisition . . . of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located." As is readily apparent, the statutory language is completely silent regarding the form that a permissible state statute might take. While Congress obviously contemplated that some states might enact laws permitting interstate banking in the future, the language of the statute nowhere states, or even implies, that such state laws would not be subject to the Commerce Clause.

Indeed, this Court has already rejected the argument that the Douglas Amendment abrogates the negative implications of the Commerce Clause. In *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980), Florida contended that its law prohibiting out-of-state bank holding companies from acquiring local investment subsidiaries was authorized by the Douglas Amendment, section 3(d), and the savings clause, section 7, of the BHCA. Commenting specifically on the language of the Douglas Amendment, the Court unanimously stated:

> "[I]t is doubtful that § 3 (d) authorizes state restrictions of any nature on bank holding company activities. . . . The only authority granted to the States is the authority to create exceptions to this general [federal] prohibition, that is, to *permit* expansion of banking across state lines where it otherwise would be federally prohibited."

447 U.S. at 47 (emphasis in original). This Court noted that "[i]n contrast to § 3 (d), § 7 of the Act does reserve

to the States a general power to enact regulations applicable to bank holding companies," but found "nothing in its language or legislative history to support the contention that it also was intended to extend to the States new powers to regulate banking that they would not have possessed absent the federal legislation." 447 U.S. at 48-49. To the contrary, the Court found that "[f]ar from creating a new state power to discriminate between foreign and local bank holding companies, the legislative history evinces an intent to forestall such a broad interpretation" and therefore held "that § 7 applies only to state legislation that operates within the boundaries marked by the Commerce Clause." 447 U.S. at 49.

Thus, as construed by this Court, the language of the Douglas Amendment, and the even broader language of section 7, fail to support the Court of Appeals' belief that the New England Compact has been authorized by Congress. Had Congress intended to allow states to create such a "multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause," *Great Atlantic & Pacific Tea Co.* v. *Cottrell,* 424 U.S. 366, 380 (1976) (quoting *Dean Milk Co.* v. *Madison,* 340 U.S. 349, 356 (1951)), it would have adopted statutory language that was unmistakably clear. It did not.

2. *Nothing in the Legislative History of the Douglas Amendment Unmistakably Authorizes the New England Compact*

The legislative history of the Douglas Amendment similarly provides no indication that Congress intended to allow the states to enact discriminatory statutes such as the Connecticut and Massachusetts Acts. The intent of Congress in enacting the BHCA was "to prevent the concentration of banking resources in the hands of a few financial giants

[and] to implement a congressional policy against control of banking and nonbanking enterprises by a single business entity." *Lewis*, 447 U.S. at 46. The House was so hostile toward the spread of bank holding companies that it proposed an absolute prohibition on bank acquisitions across state lines. *See* H.R. Rep. No. 609, 84th Cong., 1st Sess. (1955). The attitude of the Senate was more tempered; it wanted to give the Board sole power to approve such acquisitions. *See* S. Rep. No. 1095, 84th Cong., 1st Sess. (1955).

The Douglas Amendment was offered to resolve this impasse. Senator Douglas agreed with the House that the expansion of bank holding companies was not in the public interest. He stressed that the immediate practical effect of his amendment would be to bar the expansion of bank holding companies across state lines. 102 Cong. Rec. 6860 (1956) (J. App. A15). Indeed, the Senator, as well as his supporters and opponents in Congress, shared the view that although technically the states would have the power to allow such expansion in the future, no state would choose to do so.[22] Not surprisingly, therefore, Congress did not even consider the manner in which a state might elect to permit interstate banking. As the United States Court of

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[22] For example, Senator Bricker stated that "in effect, [the Douglas Amendment] constitutes an absolute prohibition against future expansion by bank holding companies." 102 Cong. Rec. 6861 (1956). Similarly, Senator Capehart declared that "under the proposed legislation we are pretty much freezing the banking system of America." *Id.* at 6934. And Senator Douglas said of his own amendment that "so far as the bank holding companies are concerned, I want to check their expansion. This seems to me to be about the best way of doing so." *Id.* at 6860. Finally, Representative Spence, the sponsor of the House bill, found no material difference between the BHCA, as amended by Senator Douglas, and the original House proposal, which would have totally prohibited interstate bank acquisitions. *Id.* at 7165.

Appeals for the District of Columbia Circuit stated in *Iowa Independent Bankers* v. *Board of Governors*, 511 F.2d 1288, 1296 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975): "Not once in the entire [Douglas Amendment] debate is the discrimination question raised."

3. *The Court of Appeals Misconstrued the Legislative History of the Douglas Amendment*

In concluding that by enacting the Douglas Amendment Congress endorsed the New England Compact, the Court of Appeals noted certain remarks by Senator Douglas during the floor debate. In particular, the court focused on (i) a comment concerning the ability of the states to permit the entry of out-of-state bank holding companies " 'only to the degree that State laws expressly permit them,' " and (ii) references that the Douglas Amendment paralleled McFadden Act provisions concerning the power of national banks to branch (Pet. App. A28 (quoting 102 Cong. Rec. 6858 (1956)). Rarely has so little been said to prove so much.

This Court has required an unmistakably clear expression of congressional intent in order to avoid judicial speculation as to what Congress "probably had in mind." *United States* v. *Public Utilities Commission*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring). Yet, sheer speculation is what is required to convert Senator Douglas' "to the degree" comment into congressional authorization for the New England Compact's rending of our federal union. Such snippets of conversation simply "are too fragmentary and unspecific to show congressional intent to authorize discrimination otherwise contrary to the Commerce Clause, especially where the Supreme Court has required such explicit and clear authorization of discrimination by the Con-

gress because of the fundamental implications of such discrimination for the federal union" (BNE order, Pet. App. A67).[23] *See New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 342 (1982) ("Reliance on such isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards. . . .").

Furthermore, this fragment from the floor debate does not suggest that the Douglas Amendment allows states to distinguish among bank holding companies in any manner they choose. In referring to "them" generally (*i.e.*, to all "out-of-state bank holding companies"), Senator Douglas' statement, if anything, supports petitioners' view (as confirmed by the plain language of the statute) that the Douglas Amendment does not authorize discrimination among out-of-state bank holding companies in a manner that violates the Constitution. The Senator's use of the ambiguous phrase "to the degree" is best understood as referring to the number of states that ultimately would choose interstate banking, rather than the unknown and unknowable terms and conditions any future state statute might impose.[24]

Nor do Senator Douglas' references to the McFadden Act, 12 U.S.C. § 36, support the decision below. The McFadden

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[23] *Accord Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.").

[24] As the Board recognized, *Iowa Independent Bankers* v. *Board of Governors*, 511 F.2d 1288 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975), cited by the Court of Appeals (Pet. App. A29-A30), "did not consider whether the alleged legislative authorization by the Douglas Amendment is express and unambiguous so as to sanction discrimination against interstate commerce that would otherwise run afoul of the Commerce Clause" (Pet. App. A69). *Iowa Bankers*, decided prior to this Court's decision in *Lewis*, involved neither the Commerce Clause nor the Compact Clause.

Act assures national banks "competitive equality" with "State banks" by giving them the identical ability to branch within a particular state. *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966). Interstate branching was simply not an issue when Congress enacted the McFadden Act. The language of the Douglas Amendment insures that federally-chartered and state-chartered banks are treated equally by banning all interstate bank acquisitions, as a matter of federal law, and then conditioning the lifting of the ban on a state statute authorizing "the acquisition of . . . a State bank." [25] In this way, and only in this way, are the Douglas Amendment and the McFadden Act parallel.

In contrast to the New England Compact, Congress has not, either in the McFadden Act or the Douglas Amendment, given preferred status to some states or groups of states while relegating others to the status of boycott targets, nor has it authorized a state to govern the conduct of banks in another state.[26] And even if the Massachusetts and Connecticut Acts had paralleled federal law in this area, the requisite congressional consent would not be established: "The fact that the state policy in this case appears to be consistent with federal policy—or even that state policy

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[25] As the House Report on the BHCA recognized, "[t]here is no constitutional basis by which a State could prohibit a corporation chartered in another State from owning or controlling a national bank located within its borders." H.R. Rep. No. 609, 84th Cong., 1st Sess. 7 (1955).

[26] *See* Golembe Aff. ¶¶ 10-29 (Ct. App. JA 333-47); *see also* Fisher & Golembe, *The Branch Banking Provisions of the McFadden Act as amended, reprinted in* Compendium of Issues Relating to Branching by Financial Institutions, Subcomm. on Financial Institutions of the Sen. Banking Comm., 94th Cong., 2d Sess. 21 (1976) ("To say that [the McFadden Act] was meant to give the states control over Federal branching policy is to misread more than a century of national bank legislative and judicial history.").

furthers the goals we might believe that Congress had in mind—is an insufficient indicium of congressional intent." *South-Central Timber Development, Inc.* v. *Wunnicke*, — U.S. —, —, 104 S. Ct. 2237, 2243 (1984). Accordingly, the McFadden Act, limited as it is to state boundaries, and grounded as it is in a concern for equality, cannot be used to construe the Douglas Amendment as authorization for the divisive state laws under review here.[27]

4. *The Court of Appeals Erred in Deferring to the Board's Incorrect and Unsupported View That the Douglas Amendment Renounces All Federal Interest in Interstate Acquisitions*

The Court of Appeals apparently considered itself bound by the Board's conclusion that the Douglas Amendment renounces all federal interest in interstate banking in favor of the states and thus shields the New England Compact from constitutional attack. This deference was surprising since the Board expressed uncertainty over this conclusion (Pet. App. A61-A71) and declined to defend its interpretation of the statute in the Court of Appeals, stating that the "legal issue of the constitutionality of the Connecticut and Massachusetts regional interstate banking statutes remains for this Court to resolve" (App. Br. at 19). The Court of Appeals simply failed to grasp the concern ex-

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[27] Nor would it be proper to imply consent to discriminatory state legislation from the Douglas Amendment's federal ban. This would require "mere speculation" about what Congress "probably had in mind" and would significantly undermine the Commerce Clause protection of unrepresented interests from parochial discrimination. This Court's requirement of unmistakable clarity assures that the national legislative process will afford the representatives of the burdened interests a clear opportunity to voice their views. To imply congressional approval of discriminatory state legislation would deny national representatives of the burdened interests their voice and would instead give the initiative to state legislatures. *See Wunnicke*, — U.S. at —, 104 S. Ct. at 2242-43.

pressed by this Court, and shared by the Board, that "[j]udicial deference to an agency's interpretation of a statute 'only sets "the framework for judicial analysis; it does not displace it."'" *Securities Industry Association* v. *Board of Governors,* — U.S. —, —, 104 S. Ct. 2979, 2983 (1984) (citations omitted). The Board itself acknowledged that its stringent "clear and unequivocal" standard of review is designed, in part, to preserve "the historic role of the judicial branch of government in balancing state and federal interests in construing the scope of the constitutional powers of the states" (Pet. App. A40). The Court of Appeals thus erred in deferring to the Board on this issue.

Construing the Douglas Amendment as a renunciation of all federal interests rests on the curious notion that in 1956 Congress, without considering even the possibility of discriminatory state statutes or compacts, and without explicitly addressing that point, intended to authorize any future deviation from the federal norm, no matter what form it took. It is inconceivable that congressional representatives from New York, Texas or California would not have voiced objections to legislation authorizing concerted boycotts against their states.

Properly understood, the Douglas Amendment bans interstate banking and then, as a matter of federal law, permits each state to determine whether interstate banking is consonant with that state's interests. Such deference to a state legislature's determination to permit interstate banking in no way authorizes discriminatory state legislation. In *Sporhase* v. *Nebraska,* 458 U.S. 941 (1982), the claim was made that by reference to some thirty-seven federal enactments and several congressionally approved interstate compacts, this Court should conclude that Congress had authorized the states to burden interstate commerce by enacting reciprocal ground water regulations. The Court rejected this argu-

ment, holding that although Congress had indicated its deference to state water laws, there was no indication that Congress "wished to remove federal constitutional constraints on such state laws." 458 U.S. at 960. Thus, "[t]he negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the *valid* state law to which Congress has deferred." 458 U.S. at 960 (emphasis in original). The same result obtains here, and the New England Compact is consequently constitutionally infirm.[28]

II

THE NEW ENGLAND COMPACT VIOLATES THE COMPACT CLAUSE

Article I, § 10, cl. 3 of the United States Constitution provides that:

> No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State. . . .

In recognition of the critical federalism concerns embodied in the Compact Clause, this Court has stated that congressional approval is required for any manner of interstate agreement that (i) injures sister states, or (ii) otherwise encroaches upon federal authority. *United States Steel Corp.* v. *Multistate Tax Commission,* 434 U.S. 452 (1978).[29]

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[28] The Court of Appeals erroneously concluded that this construction of the Douglas Amendment would present the states with an "all-or-nothing" choice as to interstate bank acquisitions. Under this Court's decision in *Lewis,* the states remain free to enact regulations applicable to bank holding companies so long as that power is exercised "within the boundaries marked by the Commerce Clause" and is not inconsistent with federal law. 447 U.S. at 48-49. The choice, therefore, is between no interstate acquisitions and a statute that comports with the Commerce Clause.

[29] The debates at the Constitutional Convention vehemently denounced "partial confederations" and regional "combinations" of

(footnote continued on following page)

Even a "potential, rather than actual, impact on federal supremacy," 434 U.S. at 472, invokes the Compact Clause requirement of congressional consent. Having both an actual and a potential adverse impact on sister states and the federal structure, and lacking congressional consent, the New England Compact is unconstitutional.

A. The Reciprocal Nature of the Massachusetts and Connecticut Statutes Compels This Court to Consider Whether the New England Compact Requires Congressional Consent

This Court has held that where two or more state statutes are reciprocal in nature, that fact alone mandates an inquiry as to whether the interstate arrangement intrudes upon the concerns embodied in the Compact Clause. In *Multistate Tax Commission,* the Court declared:

> "Agreements effected through reciprocal legislation may present opportunities for enhancement of state power at the expense of the federal supremacy similar to the threats inherent in a more formalized 'compact.' Mr. Chief Justice Taney considered this point in *Holmes* v. *Jennison,* 14 Pet., at 573:
>
> > 'Can it be supposed, that the constitutionality of the act depends on the mere form of the agreement? We think not. The Constitution looked to the essence and substance of things, and not to mere form. It would be but an

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states aimed at restricting the commerce of other states. *See, e.g., Madison, Debates in the Federal Convention of 1787, reprinted in Documents Illustrative of the Formation of the Union of the American States,* H. Doc. No. 398, 69th Cong., 1st Sess. 584, 587 (1927) ("it seems to be feared that the Northern States will oppress the trade of the south. . . . The Middle States may apprehend . . . combinations against them between the Eastern & Southern States"); *id.* at 634 ("different interests" of the North, South, East and West would lead to "oppressive regulations" of commerce).

> evasion of the constitution to place the question upon the formality with which the agreement is made.' "

434 U.S. at 470 (footnote omitted). Regardless of the form of the agreement, the relevant inquiry must be whether the regional schemes of two or more states result in an "impact on our federal structure." 434 U.S. at 471.

Any suggestion that Connecticut, Massachusetts and Rhode Island adopted their statutes unilaterally does not comport with reality. Within a period of less than a year, these New England states enacted reciprocal statutes imposing identical geographic limitations on entry by out-of-state bank holding companies into their respective states. It was only by coordinating their efforts that these states could ensure that regional banking would be established, uniform barriers to entry by outside companies would be raised, and the ultimate purpose of the Compact—to insulate New England companies from competition with non-New England firms—would be realized.

The Board's findings confirm that the Connecticut and Massachusetts Acts were concerted actions resulting from careful planning and discussions between the states:

> "Passage of the acts was preceded during a four-month period by a formal meeting of representatives of the New England states to discuss regional interstate banking, by the formation of a New England Committee to Study and Promote Regional Interstate Banking, by testimony of legislators at hearings on the issue before legislative committees in other New England states, and by apparent review and comments on the proposed Connecticut legislation by the Massachusetts Banking Department."

BNE order, Pet. App. A51.

B. The New England Compact Is Precisely the Kind of Interstate Agreement That the Compact Clause Was Designed to Regulate

The New England Compact is precisely the type of compact that, in the absence of congressional consent, is proscribed by the Constitution. Although this Court has upheld certain compacts that do not carry with them any congressional endorsement, those compacts all reflect efforts to harmonize, rather than disrupt, interstate relations.[30]

This is the first case squarely raising the issue whether a compact posing a direct affront to the sovereignty of sister states is void without congressional consent. The New England Compact is radically different in purpose and effect from the agreements that have been upheld by this Court in that, instead of promoting cooperation, the discriminatory New England Compact both: (i) benefits New England states at the expense of all other states; and (ii) affects a matter of significant national concern by interfering with and disrupting federal regulation of interstate banking.

1. *The New England Compact Benefits the Compacting States at the Expense of Excluded States and Deranges the Relations Among the States of the Union*

This Court has consistently recognized that the Compact Clause was designed to prevent groups of states from increasing their power at the expense of sister states and

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[30] Examples of such compacts for which congressional consent is not required include the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings, referred to in *New York* v. *O'Neill*, 359 U.S. 1, 3, 11 (1959) (the Constitution does not preclude states from adopting "reciprocal, voluntary legislation . . . to accomplish fruitful and unprohibited ends"); the Multistate Tax Commission at issue in *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978); the Interstate Compact on Mental Health and the Colorado River Compact of 1921 (as described in F. Zimmermann & M. Wendell, *The Law and Use of Interstate Compacts* (1976)).

thereby undermining our federal structure. For example, in *Rhode Island* v. *Massachusetts,* 37 U.S. (12 Pet.) 657, 724 (1838), the Court stated that "in giving to congress the power of dissenting to compacts" the Constitution intended "to guard against the derangement of [a state's] federal relations with the other states of the Union." In *Florida* v. *Georgia,* 58 U.S. (17 How.) 478, 493-94 (1855), the Court observed that:

> "By the 10th section of the 1st article of the constitution, no state can enter into any agreement or compact with another state, without the consent of congress. . . . This provision is obviously intended to guard the rights and interests of the other states, and to prevent any compact or agreement between any two states, which might affect injuriously the interests of the others. And the right and the duty to protect these interests is vested in the general government."

The same rationale was employed recently by this Court in *United States Steel Corp.* v. *Multistate Tax Commission,* 434 U.S. 452 (1978). While the majority and dissenting opinions disagreed about the proper application of Compact Clause principles to the facts of that particular case, there was unanimous agreement that a multistate compact would require congressional approval if it disturbed relations among sister states.

The majority considered the question whether the multistate tax compact would "redound to the benefit of any particular group of States or to the harm of others," and concluded that it would not. 434 U.S. at 477. Justice White's dissenting opinion in *Multistate Tax Commission* also emphasized that a compact that impairs the interests

of sister states is forbidden unless explicitly approved by Congress.

> "There is no want of authority for the conclusion that encroachments upon non-compact States are as seriously to be guarded against as encroachments upon the federal authority, nor is that surprising in view of the Federal Government's pre-eminent purpose to protect the rights of one State against another. If the effect of a compact were to put non-compact States at a serious disadvantage, the federal interest would thereby be affected as well."

434 U.S. at 494-95.[31]

By its very nature, the New England Compact is intended to, and does, benefit the member states to the detriment of the forty-four excluded states. Indeed, the exclusion of non-New England states, and the aggrandizement of the member states, is the essence of the New England Compact.

The purpose and effect of the New England Compact are fundamentally different from those of the interstate agreement upheld in *Multistate Tax Commission*. Three critical points distinguish the *Multistate Tax Commission* compact from the one involved here.

First, membership in the Multistate Tax Commission was open to all states on a uniform basis. The New England

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[31] *See also Cuyler* v. *Adams*, 449 U.S. 433, 451 (1981) (Rehnquist, J., dissenting on other grounds) (noting that to fall within the purview of the Compact Clause, a compact must encroach on federal supremacy or "elevate member States at the expense of nonmembers"); *Virginia* v. *Tennessee*, 148 U.S. 503 (1893); F. Zimmermann & M. Wendell, *The Law and Use of Interstate Compacts* 23 (1976); Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685, 694-95 (1925).

Compact is restricted to six states, with no avenue available to excluded states to avoid the diminution of sovereign interests. Second, the Court in *Multistate Tax Commission* found that the risk of harm inflicted upon non-member states was "independent of the Compact," since the individual states could have inflicted the identical harm on the appellants without entering into an agreement. 434 U.S. at 478. In contrast, the competitive advantages to be secured by an exclusionary banking region can only be realized by means of an arrangement among the states located within the region. Third, the *Multistate Tax Commission* compact was designed to help states act in a coordinated manner in taxing the income of interstate businesses, and involved nothing that would "redound to the benefit of any particular group of States or to the harm of others." 434 U.S. at 477. Markedly different is the New England Compact, which is specifically intended to augment regional power at the expense of all excluded states.

No constitutional precept may be cited that would shield a regional compact having direct, adverse effects on sister states from the requirement of congressional scrutiny. Under the analysis employed by the entire Court in *Multistate Tax Commission,* this fact alone renders the New England Compact invalid.

2. *The New England Compact Encroaches Upon the Exercise of Federal Authority*

The New England Compact's overt purpose and effect of increasing the power of member states at the expense of all other states has a serious adverse impact upon our federal structure. It poses an additional challenge to federal authority because it has the potential for encroaching upon federal banking laws.

The New England Compact conflicts with the federal policy articulated in 12 U.S.C. § 1823(f), part of the recently enacted Garn-St Germain Depository Institutions Act of 1982. That statute contemplates that the Federal Deposit Insurance Corporation ("FDIC") will arrange acquisitions of failing or failed banking institutions by out-of-state bank holding companies, where in-state alternatives are unavailable or unsatisfactory. The Massachusetts and Connecticut Acts, however, prohibit Massachusetts and Connecticut banks and bank holding companies from acquiring non-New England banks (Pet. App. A99, A101-A102), and thereby prevent the FDIC from looking toward Massachusetts and Connecticut banking institutions to save failing or failed non-New England banks.

Peculiar to the Connecticut Act, moreover, is the inhibiting effect it has on the FDIC's responsibility even to solicit bids for failing or failed non-New England banks from bank holding companies located in other New England states (*e.g.*, Massachusetts) that control or desire to control a Connecticut bank. This is because such a company would be required to divest itself of its Connecticut banks, or would be prohibited from making such an acquisition, if it acquired a non-New England Bank (Pet. App. A99). The Connecticut Act, and the New England Compact of which it is part, thus conflict with the paramount federal policy providing for the interstate acquisition of failing or failed banks, and accordingly violate the Compact Clause.[32]

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[32] It cannot be argued that because the Garn-St Germain Act, by its terms, sought to supersede "any other provision of law, State or Federal," 12 U.S.C. § 1823(f)(4)(i), there is no encroachment upon federal authority under the Compact Clause. Supreme federal interests are impaired, if the effect of state action "is to discourage conduct that federal action seeks to encourage." L. Tribe, *American*

(footnote continued on following page)

C. The Douglas Amendment Does Not Constitute Congressional Consent to Regionally Restrictive Interstate Banking Compacts

The foregoing discussion, *see* pp. 20-30, *supra,* leaves no doubt that Congress in enacting the Douglas Amendment has never authorized restrictive regional interstate banking. Even if the Douglas Amendment may be construed as constituting congressional consent to individual states to burden interstate commerce, it does not follow that by this action Congress has approved the coordinated action of several states to carve out for themselves a separate banking zone.

The different standards of congressional authorization for the Commerce and Compact Clauses can be explained by the very language of the Constitution. The Commerce Clause bestows a particular power upon Congress; the limitation on the power of the states to erect barriers against interstate trade is a judicial, albeit a logical, implication from the congressional power. By contrast, the language of the Compact Clause leaves little room for debate on what constitutes congressional consent. It provides an absolute prohibition against interstate compacts "without the Consent of Congress." Such explicit language, when analyzed under the lens of the Clause's history, compels the conclusion that congressional approval of an interstate compact must be made explicitly and with full knowledge of its ramifications.

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Constitutional Law 378 (1978); *see, e.g., Nash* v. *Florida Industrial Commission,* 389 U.S. 235, 239 (1967). There is no question but that the New England Compact on its face discourages the federal policy embodied in the Garn-St Germain Act. Under the analysis employed in Compact Clause cases, this encroachment upon a paramount federal interest requires that the compact be struck down absent Congressional approval.

Neither the language of the Douglas Amendment nor the debates prior to its enactment, contemplate coordinated state action to create a banking region to the detriment of excluded states. The Douglas Amendment speaks solely of a single host "State," not a group of states. This Court has said that, when Congress refers to control by a single state, "the language has no relation to possible joint control by two or more States under the compact clause of the Constitution." *United States* v. *Public Utilities Commission*, 345 U.S. 295, 309 n.16 (1953) (quoting *Safe Harbor Water Power Corp.* v. *Federal Power Commission*, 179 F.2d 179, 187 (3d Cir. 1949)). Thus, there can be no argument that the Douglas Amendment authorizes groups of states to band together in restrictive interstate banking compacts.

There is likewise no substance under the Compact Clause to the argument that the Douglas Amendment represents a "renunciation of federal interest." This argument required the Court of Appeals to maintain that, while Congress has never considered and approved discriminatory regional banking compacts, [33] the language of the Douglas Amendment constitutes advance consent for states to form any manner of discriminatory banking combination they choose. Such a view completely eviscerates the Compact Clause's requirement of congressional consent and is belied by Congress' "renewed interest" in interstate banking in 1982, when it amended the Douglas Amendment to conform that statute to the failing bank provisions of the Garn-St German Act.[34]

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[33] Even the proponents of regional banking would concede that Congressional authorization for such activity is lacking, since they have lobbied unsuccessfully for such legislation in the last two years.

[34] Congress in 1982 amended the Douglas Amendment to exempt from its proscription against interstate banking any "application filed as a result of a transaction authorized under section 13(f) of the Federal Deposit Insurance Act."

The renunciation theory embraced by the Court of Appeals also ignores the practical reality of how Congress approves compacts. As the Chairman of the House Committee on the Judiciary has observed:

> "Typically, compacts are negotiated and agreed to by the States and then submitted to Congress for careful review and approval. . . . While the Congress has on rare occasions authorized certain compacts in advance, it has done so only after long and thoughtful deliberation of the potential consequences."

Pet. Reply Brief App. A2. Neither procedure was followed here.

Finally, the Court of Appeals erred in its analysis of congressional authorization under the Compact Clause by concluding that "if at any time Congress should find any encroachment [on the part of the compact], it could remove the encroachment by appropriate legislation" (Pet. App. A32). This theory would authorize any compact—no matter how pernicious—simply because Congress could later invalidate it. That is not the law. The Constitution gives Congress the initiative in controlling regional arrangements—it does not, contrary to the Court of Appeals, relegate Congress to the more passive role of acting after the fact.

CONCLUSION

For the reasons set forth above, petitioners respectfully request that the judgment of the Court of Appeals be reversed and that the Connecticut and Massachusetts Acts be declared unconstitutional.

Respectfully submitted,

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